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estate of W. W. McCoy among his nine children, but are of opinion that such a result will thereby be so nearly attained as is possible under the facts and circumstances disclosed in the record.

The decree of the lower court requires the complainants, appellants here, to pay the costs of the execution of the decree of reference above referred to, and this ruling is assigned as error.

We are of opinion that the ruling is erroneous. This is a suit for the partition of the real estate of W. W. McCoy, deceased, and a distribution of his personal estate among his heirs at law and distributees, and the reference of the cause to a commissioner to make the inquiries directed was but ancillary to the other proceedings in the cause. The inquiries directed were the usual and necessary inquiries in such a case, and it is the universal practice in the courts of this state to pay the costs of the entire proceedings out of the assets of the decedent's estate. Nothing appears in the record to take the case out of the general rule as to costs, governing in such cases.

It follows that the decree appealed from, in so far as it conflicts with this opinion, must be reversed and annulled, and the cause remanded, to be further proceeded with in accordance with the views herein expressed.

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LEWIS *et al. v.* COMMONWEALTH.

Sept. 20, 1906.

[54 S. E. 999.]

**Bail—Scire Facias—Return of Writ.**—Code 1887, § 3220 [Va. Code 1904, p. 1694] provides that process shall be returnable within 90 days from date * * * except that process awarded in court may be returnable as the court shall direct. Held, that where a recognizance was adjudged forfeited, and the court ordered that the principal and sureties be summoned to appear on a certain day, and subsequently the clerk issued a scire facias returnable on that day, which was more than 90 days from the date of the writ, it was within the exception of the statute.

Error from Circuit Court, Bath County.

Proceedings by the commonwealth against Jerry Lewis and others on a forfeited recognizance. Judgment for the commonwealth, and defendants bring error. Affirmed.

*Charles Curry,* for plaintiff in error.

*Wm. A. Anderson,* Atty. Gen., for the Commonwealth.

KEITH, P. Virginia Lewis, Jerry Lewis, and Samuel Lindsay, of the city of Staunton, on the 3d day of June, 1905, appeared before S. W. Anderson, bail commissioner, of the circuit court

of Bath county, and acknowledged themselves to be indebted to the commonwealth of Virginia in the sum of $500, to be made and levied of their several goods and chattels, lands, and tenements to the use of the commonwealth of Virginia if the said Virginia Lewis should make default in the performance of the conditions of the recognizance. The condition of this recognizance was that Virginia Lewis should appear before the circuit court of Bath county on the first day of the then next term, to wit, on the 20th day of July, 1905, to answer a certain felony alleged by her to have been committed, and that she should not depart thence without leave of the court.

Virginia Lewis not appearing at the time and place named, the circuit court of Bath county ordered that she and her sureties be summoned to appear on the first day of the next term of court to show cause, if any they could, why the commonwealth should not have execution against them on their said recognizance. In the vacation of the court, on the 11th day of August, 1905, a scire facias was issued from the clerk's office, which is in the words and figures following, to wit:

"Commonwealth of Virginia.

To the Sheriff of Augusta County,

Greeting:

"Whereas, Virginia Lewis, Jerry Lewis, and Samuel Lindsay at the courthouse of the county of Bath, on the 3d day of June, 1905, personally appeared before S. W. Anderson, bail commissioner of the circuit court of Bath county, and acknowledged themselves severally indebted to the commonwealth of Virginia, the said Virginia Lewis in the sum of five hundred dollars, the said Jerry Lewis in the sum of five hundred dollars, and Samuel Lindsay in the sum of five hundred dollars, of their respective goods and chattels, lands and tenements to be levied and to the said commonwealth rendered; yet upon condition, that if the said Virginia Lewis should personally appear before the circuit court of Bath county at the courthouse thereof on the first day of the next term thereof, to wit, on the 20th day of July, 1905, then and there to answer the commonwealth for and concerning a felony alleged to have been by her committed, in feloniously stealing the goods of E. Coxe and wife, wherewith the said Virginia Lewis stands charged, and should not depart thence without leave of court, then the said recognizance was to be void, as by said recognizance filed among the records of said court manifestly appear; and whereas, the said Virginia Lewis hath failed to make her personal appearance before the judge of our said circuit court at the time and place aforesaid according to the conditions of said recognizance, as appears of record:

"Therefore, we command you, that you make known to the said Virginia Lewis, Jerry Lewis, and Samuel Lindsay that they

be before the judge of our said circuit court for the county of Bath at the courthouse thereof on the first day of the next term, to wit, on the 20th day of November, 1905, to show if anything for themselves they have or can say why the said commonwealth execution against them, the said Virginia Lewis, Jerry Lewis, and Samuel Lindsay, of the several sums of money aforesaid, ought not to have, if to us it shall seem expedient, and further to do and receive what our said circuit court then and there of them in this part shall consider.

"And have then and there this writ.

"Witness F. L. La Rue, clerk of said circuit court at the courthouse thereof, on the 11th day of August, 1905, and in the 130th year of the commonwealth.

"F. L. La Rue, Clerk."

This process was executed upon Jerry Lewis and Samuel Lindsay, but was not executed upon Virginia Lewis, she not being found by the sheriff.

On the 20th day of November, 1905, Jerry Lewis and Samuel Lindsay appeared by counsel, and demurred to the foregoing scire facias, and for ground of demurrer stated that the scire facia was issued on the 11th day of August, 1905, returnable to the first day of the next term of the circuit court of Bath county, November 20, 1905, more than 90 days after it was issued, and is therefore void and of no effect.

The circuit court overruled the demurrer, and awarded execution upon the scire facias.

Counsel for plaintiffs in error, in support of the demurrer, relies upon section 3220 of the Code of 1887 [Va. Code 1904, p. 1694] which provides that: "Process from any court, whether original, mesne, or final, may be directed to the sheriff or sergeant of any county or corporation. * * * Process shall be issued before the rule day to which it is returnable, and may be executed on or before that day. * * * It shall be returnable, within ninety days after its date, to the court on the first day of a term, or in the clerk's office, to the first or third Monday in a month, or to the first day of any rules, except that a summons for a witness shall be returnable on whatever day his attendance is desired, and process awarded in court may be returnable as the court shall direct."

In Lavell *v.* McCurdy, 77 Va. 763, the court in passing upon a scire facias to revive a judgment, held that the process referred to in section 3220 embraced the writ of scire facias, and that the writ was void if not on its face returnable in accordance with the provisions of the statute.

A scire facias to revive a judgment may be sued out of the clerk's office without the intervention of the court; but a scire facias praying an award of execution upon a bail bond must

issue in accordance with the mandate of a court, for a condition precedent to its issuance is that the recognizance shall be declared to have been forfeited by reason of the nonfulfillment of its condition upon the part of the person bound by it. It is true that in Lavell *v.* McCurdy, supra, the writ was ordered to issue by the court, but as it might have been issued by the clerk and as the order of the court is not referred to in the writ it might have been argued that the clerk had issued it ex meru motu and not in obedience to the mandate of the court. But in the case before us, the parties had been recognized to appear at the July term of the court; that was the condition of their recognizance. The principal in the bail bond did not appear, and the condition being broken, the recognizance was adjudged to have been forfeited, and summons was directed to issue returnable on the first day of the next term of the court, to wit, on the 20th day of November, 1905. That was the order of the court to its clerk, and on the 11th day of August the writ of scire facias was issued which satisfies in every respect the duty which the clerk was directed by the court to perform. We think it must be held that the clerk, in issuing the writ, acted in obedience to the mandate of the court, and in making it returnable on the first day of the next term he complied literally with the order of the court. The case, therefore, falls within the exception of the statute, which expressly declares that a summons for a witness shall be returnable on whatever day his attendance is desired, and process awarded in court may be returnable as the court shall direct.

In Lavell *v.* McCurdy, 77 Va., on page 770, the court, referring to the statute, uses the following language: "The imperative command of the statute is that process from any court, whether original, mesne or final, except a summons for a witness, shall be returnable within ninety days after its date, to the court on the first day of a term, or in the clerk's office, to the first Monday in a month, or to some rule day." The statute in this respect has remained unaltered, and appears in the Code of 1873 as it does in that of to-day. The court, it will be perceived from the quotation, does not refer to so much of the exception set forth in the statute as refers to process awarded in court, which is as much an exception to the statute as a summons for a witness; the one is made returnable on whatever day his attendance is desired, and the other as the court shall direct. How this omission to notice one of the terms of the exception of the statute occurred and how far it affected the judgment of the court, we have no means of ascertaining; nor are we at present concerned to determine how far the circumstances of that case, that the scire facias was to revive a judgment and that the writ might have issued from the clerk's office without the intervention of

the court, and as a consequence the court was unable to say whether it was done in obedience to the mandate of the court or by the clerk of his own motion, we need not determine.

We are of opinion that under the circumstances of this case, which is that of a scire facias to procure an award of execution upon a recognizance, which could only be issued after the court had adjudged upon the failure of the party to appear that the recognizance was forfeited, and directed that process issue returnable to the first day of the next term, to wit, on the 20th of November following, such process so directed by the court, issued by the clerk, and made returnable as directed is to be taken as a compliance on the part of the clerk with the order of the court, and brings the case within the terms of the exception.

From which it follows that the demurrer to the writ was properly overruled, and the judgment of the circuit court is affirmed.

**Note.**

The reasoning of the court in this case seems to be irresistible. The Virginia Code excepts "process awarded in court," in providing that process generally shall be returnable within ninety days from its date. The conclusion arrived at is that if the process **may** be issued by the clerk, not in obedience to the mandate of the clerk, such process is not within the meaning of this exception. In short, it is required that the process be of such a nature that it **must** issue in accordance with the mandate of the court. It is important, in light of this decision, to ascertain when an order of court is a prerequisite to the issuance of a writ.

Where it is manifest that there is but one suit against one defendant, the clerk has no authority, without some express order of the court, to issue more than one process, his power to issue being then exhausted. Peck *v.* La Roche, 86 Ga. 316.

In this case it was held, that entries of continuance made before service are mere memoranda by the judge on the bench docket, and do not import that the court had granted leave or order to issue a second process or extend the time for service. On the contrary, such entries would import that so far as the judge knew or had reason to believe, the case was pending in court like other cases in which due service had been affected.

Where the statute provides that the authority of the clerk to issue a summons cannot be exercised after the expiration of a fixed time from the filing of the complaint without an order of the court, the clerk is without authority, in a case coming within the statute, unless such an order is made. Dupuy *v.* Shear, 29 Cal. 238.

Where, under a statute relating to a special proceeding of a summary nature, a summons must issue upon the order of the court, the clerk has no authority to issue a summons upon the filing of a petition, as in ordinary civil actions. Williams *v.* Monroe, 125 Mo. 574.

A citation issued and signed by the parish recorder in his official capacity, instead of the clerk, will be fatal to the validity of any judgment which may be rendered against the party on whom it was served. Anderson *v.* Joliett, 14 La. Ann. 614.

Where a clerk signs a blank writ, and hands it to an attorney, and he fills out the blank, if returned to the clerk, and received by him and regularly docketed as a writ, he is concluded from alleging that

the writ was issued without authority. Croom *v.* Morrisey, 63 N. C. 591.

The clerk of a superior court acts ministerially, and not judicially, in issuing a summons; and, in an action in his own behalf, he may himself issue the summons and other process. Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633.

As to the meaning of this phrase "process awarded in court," the court in Hastings *v.* Columbus, 42 O. St. 588, uses the following language: "By force of the adoption by several Saxon kings, and general acquiescence for centuries in such adoption, the canon promulgated A. D. 517 acquired the force of, and became in truth common law, in a single particular, namely, that process awarded, or a judgment rendered, by a court on Sunday, was void, and that is the law wherever the common law prevails, except as modified by statute. Swann *v.* Broome, Hiller *v.* English. Whether this prohibits the receipt of a verdict on Sunday, is a matter about which there is some conflict, with the weight of authority in favor of the power to receive the verdict on that day. In Morehead *v.* State (reported on other points in 34 Ohio St. 212), the verdict was received on Sunday, and this court unanimously held that there was no error in so receiving it. That process issued by a ministerial officer, in the ordinary course of official duty, is not process awarded by a court, within the meaning of the above phrase, was shown in Clough *v.* Shepherd, 31 N. H. 490."

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## FAYETTE NAT. BANK *v.* SUMMERS.

Sept. 13, 1906.

[54 S. E. 862.]

**1. Bills and Notes—Bona Fide Purchasers—Checks—Deposit in Bank—Title of Bank.**—Where a check is passed by a bank to the credit of the depositor and mingled with its general funds, the bank may permit the depositor, as a matter of favor, to check against the deposit before the collection of the check; the depositor in the event of nonpayment being responsible for the sums drawn, so that such deposit does not necessarily make the bank a bona fide indorsee of the check for value.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 908.]

**2. Sales—False Representations—Failure of Consideration—Damages—Set-Off.**—In an action on a check given for the price of a horse sold to plaintiff on certain representations, one of which proved false, where it appeared that the horse in spite of the defect was of considerable value and that the damages sustained by the false representation did not go to the full amount of the check which represented the full value of the horse as represented, plaintiff was entitled to recover such value of the horse less the damage caused by the defect.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 966, 1061.]